NO. 80-2045

Office-Supreme Court, U.S.
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JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DONALD LYNN BILLMAN, Appellant,

v.

COLUMBUS BAR ASSOCIATION, Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

APPELLEE'S MOTION TO DISMISS AND ARGUMENT IN SUPPORT THEREOF

BRUCE A. CAMPBELL
360 S. Third Street
Columbus, Ohio 43215
(614) 228-8952

COUNSEL FOR APPELLEE

Of Counsel:

MARY ELLEN FAIRFIELD
Vorys, Sater,
Seymour & Pease
52 East Gay Street
Columbus, Ohio 43215
(614) 464-6335

THOMAS E. WORKMAN
Bricker & Eckler
100 East Broad Street
Columbus, Ohio 43215
(614) 227-2331

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IN THE SUPREME COURT OF THE UNITED STATES

Donald Lynn Billman,	:	
	:	
Appellant	:	
	:	
v.	:	Case Number 80-2045
	:	
Columbus Bar Association,	:	
	:	
Appellee	:	

MOTION TO DISMISS

Now comes the Appellee and, pursuant to Rule 16.1(b) of the Rules of the Supreme Court, moves that this case be dismissed because it does not present a substantial and properly raised federal question and because the judgment below rests upon an adequate non-federal basis.

BRUCE A. CAMPBELL
360 South Third Street
Columbus, Ohio 43215
(614) 228-8952

COUNSEL FOR APPELLEE

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MARY ELLEN FAIRFIELD
Vorys, Sater, Seymour & Pease
52 East Gay Street
Columbus, Ohio 43215
(614) 464-6335

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CONSTITUTIONAL PROVISIONS

U.S. Constitution, First Amendment

U.S. Constitution, Sixth Amendment

U.S. Constitution, Fourteenth Amendment

STATUTE

Ohio Revised Code Sec. 2505.21

RULES

Ohio Code of Professional Responsibility Section DR 7-104

Ohio Supreme Court Rules for the Government of the Bar, Rule V Sec. 4

Ohio Supreme Court Rules for the Government of the Bar, Rule V Sec. 38

TEXTBOOK

Wright, C.A., Law of Federal Courts 3rd Ed. (West; 1970)

OTHER

21 C.J.S. Courts (1940)

STATEMENT OF THE CASE

Appellant, a lawyer practicing in Columbus, Ohio, was charged by the Columbus Bar Association with numerous violations of the Ohio Code of Professional Responsibility arising out of Appellant's practice in this jurisdiction.

As is provided by rule of the Ohio Supreme Court, the matter was submitted for hearing to a Panel consisting of three members of the Board of Commissioners on Grievances and Discipline, a body created and appointed by the Ohio Supreme Court itself. The Panel held two complete days of hearing during which numerous witnesses testified and many exhibits were introduced. Appellant was represented by counsel during these proceedings.

After review of a complete transcript of the hearing and submission of extensive briefs by the parties, the Panel, on November 5, 1980, filed with the Ohio Supreme Court its Findings of Fact and Recommendation concluding that Appellant had:

1) acted without authority in filing a foreclosure action after having been discharged by his former client;

2) communicated directly with a party of adverse interest represented by counsel (two counts);

3) revealed confidential information received in the course of representing a client;

4) used a confidence or secret of client to the disadvantage of the client;

5) engaged in conduct adversely reflecting on his fitness to practice law.

The Panel recommended to the Ohio Supreme Court that Appellant be given a public reprimand.

The Ohio Supreme Court provided the parties with the opportunity to submit objections to the Findings of Fact and Recommendations of the Board of Commissioners and, thereafter, heard oral argument before deciding on March 4, 1981, to "confirm" the Final Report of the Commissioners on Grievances and Discipline and to publicly reprimand Appellant. Pursuant to court order the reprimand was printed in the Ohio Bar , the official publication of the Ohio State Bar Association, on March 16, 1981.

ARGUMENT

I. THE GOVERNANCE OF THE BAR OF THE STATE OF OHIO IS THE PROVINCE OF THE OHIO SUPREME COURT, AND, ABSENT SUBSTANTIAL FEDERAL QUESTIONS, THAT COURT'S ACTION TO PUBLICLY REPRIMAND APPELLANT IS NOT THE PROPER SUBJECT FOR REVIEW IN THIS COURT.

This Court has recognized on a number of occasions the right of the individual states through their courts to supervise the practice of law in their jurisdiction by means of admission standards, codes of professional responsibility and provisions for punishing unethical behavior.

> "The States enjoy broad power to regulate "the practice of professions within their boundaries," and "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental functions of administering justice, and have historically been 'officers of the Courts.'" Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)...

In Re Primus, 436 U.S. 412, 422 (1978)

See also, Lathrop v. Donohue, 367 U.S. 820 (1961); Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978).

Only in situations in which it has perceived a clear abridgement of a federal statutory or constitutional right by state disciplinary proceedings, e.g.

In Re Primus, supra, has this Court been willing to review the judgments of the highest court of a state in its supervision of the legal practice of that state. This restraint is consistent with the general policy of the Court to leave to state courts the interpretation of state law and to avoid review of purely factual determinations made in state courts. See, Wright, C.A., Law of Federal Courts 3rd Ed. 535 Sec. 107 (West; 1970).

Appellant apparently asks this Court to depart from this practice. Aside from making vague assertions of federal constitutional issues in his "Questions Presented," -- issues which, as will be pointed out subsequently, Appellant fails to substantiate -- Appellant has devoted almost the entirety of the argument in his lengthy and rambling Jurisdictional Statement to a rehashing of the evidence presented before the Board of Commissioners in an attempt to urge this Court to substitute its judgment on purely factual matters and issues of credibility for that of the Ohio Supreme Court and its Commissioners on Grievances and Discipline.

Especially is this so with respect to the "Questions" Appellant has designated IV through VIII.

In Questions IV, V and VII, under the guise of free speech claims, Appellant seeks to show in his argument (Jurisdictional Statement pp. 40-46 and 50-54) that, given the facts presented at the hearing on these charges, he did not on two separate occasions violate a rule of conduct prohibiting contact by an attorney with a person of adverse interest. As to Question VI, ostensibly a due process proposition, he argues (Id. pp. 46-50) that he was justified in revealing the confidences of a client under the circumstances pertaining. In reference to Question VIII, in which he again claims, but does not demonstrate, due process considerations, Appellant merely contends in his argument (Id. pp. 54-64,)[1] that, given the particular circumstances and Ohio law on the subject, he acted properly in undertaking and pursuing through three courts an action on behalf of a client he did not represent. As

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1. It is interesting to note that in making this argument, at page 60 of his Jurisdictional Statement, Appellant includes what purports to be a quote from Bolton v. Marshall, 153 Ohio St. 250, 91 NE2d. 508 (1950). In fact, these words do not appear in the case, and the case stands for an entirely different proposition than the one for which it is cited.

to each of these assertions the Board of Commissioners of the Ohio Supreme Court, after weighing the entirety of the evidence presented, judging the credibility of witnesses and applying state standards of ethical conduct, found Mr. Billman's claims wanting. It is not rightly within the burden of this Court to undertake, as Appellant requests, to assess the weight of evidence presented before the tribunal below, to engage in speculation about the motivation and credibility of those who came forward to testify against Appellant in the trial of this disciplinary action or to balance testimony about the Appellant's character and reputation against the severity of ethical violations charged. These are matters uniquely within the ability of the trier of fact and the court directly responsible for supervision of the practice of law in Ohio courts; this Court need not and, indeed, should not involve itself in these types of issues.

II. APPELLANT'S DUE PROCESS CLAIMS ARE NOT SUBSTANTIATED BY CASE LAW.

A. The Due Process Clause of the Fourteenth Amendment of the United States Constitution Does Not Require a Court to Expressly Address in a Written Opinion All Arguments Raised Before It.

Appellant argues in Question I. that procedural due process under the Fourteenth Amendment of the United States Constitution entitles him to an opinion by the Ohio Supreme Court which specifically addresses the constitutional arguments presented by Appellant to the Court. Implicit in his argument is the contention that due process requires an appeals court not only to issue an opinion in every case, but also to respond expressly to every objection put to it. There is, in fact, no such constitutional requirement. In Taylor v. McKeithen, 407 U.S. 191 (1972), it was stated that appeals courts should have wide latitude in their decisions of whether or not to write opinions. This is reflective of the general rule that, except as required by provisions of state constitutions or statutes, opinions need not be written by the court and whether or not to do so is discretionary. 21 C.J.S. Courts Sec. 217 (1940). This principle is the necessary predicate for the error in Appellant's argument that the court denied due process by failing to respond to

all arguments presented. If it is not a denial of the due process clause of the Fourteenth Amendment to decide not to write an opinion at all, it follows that neither can it be a denial to issue an opinion which does not address every error raised.

Ohio Revised Code Sec. 2505.21 does require a court to pass upon all errors assigned in a case, but the general rule has been that if a constitutional question is argued and the opinion contains no discussion thereof, it may be assumed that the court has inferentially passed on the constitutionality of the statute. State ex. rel. Watkins v. Donahey, 110 Ohio St. 52, 144 N.E. 125 (1924); Ames v. Consolidated Iron-Steel Mfg. Co., 9 Ohio L. Abs. 494 (Ct. App. Cuyahoga Co. 1930). In this case, therefore, it may be assumed that the Ohio Supreme Court, by not fully discussing each challenge presented to the Disciplinary Rules, has inferentially upheld their constitutionality.

B. The Time Restrictions for Investigation of Complaints are Designed to Protect the Public and Not the Attorney; Minor Delays in Investigation are not Prejudicial Such that Due Process is Violated.

Appellant next argues in Question II that the due process clause of the Fourteenth Amendment of the

United States Constitution was violated when charges against him were not timely heard under time restrictions in the state Supreme Court Rules. While due process does require a "speedy" trial, Klopfer v. North Carolina, 386 U.S. 213 (1967), this guarantee encompasses time frames after the charges have been filed. It is not a guarantee of speedy disposition measured from the date of the offense or investigation. United States v. Marion, 404 U.S. 307 (1971).

Rule V Sec. 4 of the Ohio Supreme Court Rules for the Government of the Bar of Ohio reads in relevant part as follows:

***

> The investigation of complaints ... shall be concluded within sixty days from the date of the receipt of the complaint. A decision as to the disposition of such complaint shall be made within sixty days thereafter. Extensions of time for completion of the investigation may be granted upon written request, and for good cause shown, by the Secretary or Acting Secretary, of the Board of Commissioners on Grievances and Discipline. If any investigation is not completed within one-hundred-fifty days, the matter under investigation shall be referred to the Disciplinary Counsel.

***

It is obvious that the purpose of this Rule is to guarantee that every complaint received from the public is investigated and properly disposed. The proceedings

are instituted to safeguard the courts and to protect the public from the misconduct of those who are licensed Ohio St. 2d 97, 322 N.E. 2d 665 (1975). Thus, the provision is not intended as a jurisdictional bar to the prosecution of an attorney for alleged misdeeds and it is not in the nature of a speedy trial statute of limitations which would release an attorney from prosecution for ethical misconduct.

This interpretation can be supported on several bases. The provision only restricts the time frame within which investigation must be completed. It does not contain any requirement with regard to the time frame within which a formal complaint must be filed with the Board of Commissioners. Second, the time restrictions on investigations, if not satisfied, result in the matter being forwarded to the Disciplinary Counsel, but certainly not disposed of without investigation and prosecution, if appropriate. This element clearly distinguishes it from being in the nature of a statute of limitations which would eventually release an attorney for prosecution. Third, the provision only refers to time restrictions when complaints are received from the public. It does not apply when misconduct is discovered and investigated

by the Bar itself. Thus, it is clear that this restriction on investigations is intended only to keep faith with the public by assuring it that any and all complaints received will be promptly investigated. This conclusion is supported by the Ohio Supreme Court in Ohio State Bar Assn. v. Illman, 45 Ohio St. 2d 159, 342 N.E. 2d 688 (1976): "The primary function of disciplinary proceedings is investigatory, not accusatory or prosecutorial, and those proceedings are neither civil nor criminal in nature. The standards of due process in such proceedings are not those in a criminal proceeding ..." Id. at 162, 342 N.E. 2d at 690.

Finally, Rule V Sec. 38 makes it clear that the time restrictions are not designed to permanently bar proceedings otherwise appropriate, unless such delays result in prejudice or a miscarriage of justice:

> "... No investigation or procedure shall be held to be invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice. This Rule and such regulations relating to investigations and proceedings involving complaints of misconduct and petitions for reinstatement shall be liberally construed for the protection of the public, the Courts and the legal profession ..."

Appellant in this case has not been unduly prejudiced by the form of these proceedings. Prejudice such that a miscarriage of justice will ensue generally involves long overdue actions, see Columbus Bar Assn. v. Teaford, 6 Ohio St. 2d 253, 217 N.E. 2d 872 (1966), in which the client did not bring the complaint for four years after the alleged misconduct; or lack of notice to accused, see In re Ruffalo, 390 U.S. 544 (1968), in which the attorney was given no notice of the charges subsequently used to disbar him.

In this case there is no such overt or substantial prejudice. A joint stipulation of facts, included in the evidence introduced at the hearing, showed that the longest period of time which elapsed between receipt of a complaint from a member of the public and the completion of the investigation was from November 7, 1978 to July 10, 1979. This eight month time span can hardly be considered as a prejudice comparable to the Teaford case in which four years were allowed to elapse before the complaint was lodged by the bar association. Evidence and claims do not grow stale in eight months making it unfair to expect an attorney to defend himself. In addition, the delays in investigation were primarily the result of the number of subsequent complaints which were

being received and the necessity of time required to complete thorough investigations of all of them. The prejudice ensuing to the Appellant must be considered minimal; he was properly notified, the charges were not stale, the evidence was not aged, and the time was not unreasonable in view of the volume of complaints requiring investigation.

III. APPELLANT'S JURISDICTIONAL STATEMENT DOES NOT PROPERLY RAISE AN ISSUE UNDER THE FIRST ADMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Appellant argues in Questions IV and V of his Jurisdictional Statement that the public reprimand which he received for violations of Disciplinary Rule 7-104 infringed upon his right of free speech under the First Amendment of the Constitution of the United States. Appellant failed to raise this issue before the Supreme Court of Ohio in his Objections to the Findings and Recommendation of the Board of Commissioners on Grievances and Discipline. Appendix to Jurisdictional Statement pp. 19a-21a. Therefore, this issue is not properly before this Court.

Even had the issue been properly raised below, Appellant fails to offer any authority for the proposition that DR 7-104 violates any rights protected by the First Amendment. Instead, he simply reargues the factual disputes which have been resolved in proceedings below.

The Board of Commissioners found that Appellant, during the course of his representing a defendant in a criminal case, interviewed a co-defendant of adverse interest, knowing that the co-defendant was represented

by counsel. Appellant then transcribed the interview and, without notice to the co-defendant's counsel, filed it as an exhibit to a motion for a new trial for his client.

Without actually addressing the issue in his Brief, Appellant suggests that DR 7-104, which prohibited this conduct, "chills" his right of free speech. However, it is clear that the State does not lose its power to regulate the activities of the Bar simply because speech is a component of those activities. Ohralik v. Ohio St. Bar Assn., supra. Moreover, the Rule in question is designed to protect the adverse party's Sixth Amendment right to counsel in criminal proceedings.

> The concept that persons are benefited by retention of and active representation by a lawyer is deeply ingrained in our legal system. The status that we afford this belief is most evident in the development of the Sixth Amendment right to counsel in criminal proceedings; the ongoing constitutional debate over when and how this right may be waived reflects the high importance many attach to protecting a litigant, not only from the approaches of his adversary's lawyer, but from the folly of his own well-meaning initiatives and the generally unfortunate consequences of his ignorance.
>
> People v. Green, 405 Mich. 273 (1978).

While it is clear that lawyers have First Amendment rights of free speech, they also enjoy privileges

not enjoyed by other citizens. Along with those privileges, they have special responsibilities and are subject to special disciplinary sanctions if they violate their responsibilities to the Courts, the public or to other litigants. Hirschkop v. Snead, 594 F. 2d 356 (4th Cir. 1979). The Disciplinary Rule in question serves to curb overreaching behavior by members of the Bar.

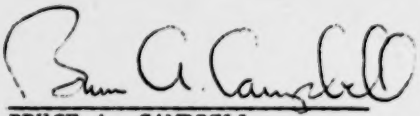
> The reasons for such a prohibition are equally clear. They arise out of the nature of the relation of attorney and client and are equally imperative in the right and interest of the adverse party and of his attorney. To preserve the proper functioning of the legal profession as well as to shield the adverse party from improper approaches the Canon is wise and beneficient and should be obeyed.
>
> People v. Green, supra at 290.

DR 7-104 does not violate the First Amendment and is, in fact, designed to prevent serious violations of a defendant's Sixth Amendment right to counsel. The Court should dismiss the appeal on this issue.

CONCLUSION

No substantial federal question exists in this appeal that merits the attention of this Court. The case should be dismissed.

Respectfully Submitted,



BRUCE A. CAMPBELL
360 South Third Street
Columbus, Ohio 43215
(614) 228-8952

COUNSEL FOR APPELLEE

Of Counsel:

MARY ELLEN FAIRFIELD
Vorys, Sater, Seymour & Pease
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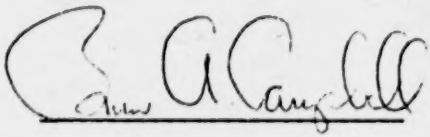
CERTIFICATE OF SERVICE

The undersigned Counsel of Record for Appellee hereby certifies that, pursuant to Rule 28 of the Rules of the Supreme Court, three (3) copies of this Motion have been mailed, postage fully paid, to Donald Lynn Billman at his office at 915 South High Street, Columbus, Ohio 43206 this 15th day of July, 1981.



BRUCE A. CAMPBELL
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COUNSEL FOR APPELLEE